IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 233.

NAOMI PETTY, Administratrix of the Estate of
FAYE R. PETTY, Deceased,
Petitioner,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION,
a Corporation,
Respondent.

RESPONDENT'S BRIEF.

JAMES M. REEVES,
Caruthersville, Missouri,
WARD & REEVES,
Caruthersville, Missouri,
Attorneys for Respondent.

INDEX

Table of Cases

TEXTS AND STATUTES

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 233.

NAOMI PETTY, Administratrix of the Estate of FAYE R. PETTY, Deceased,
Petitioner,

vs.

TENNESSEE-MISSOURI BRIDGE COMMISSION,
a Corporation,
Respondent.

RESPONDENT'S BRIEF.

STATEMENT.

Respondent adopts the Statement of Facts contained in Petitioner's Brief, but desires to supplement the Statement with the following admitted facts:

Respondent Commission is controlled by State Officials appointed by the respective governors with Senate con-

firmation, and veto power is reserved to the governors. The Commission is authorized to issue revenue bonds, and the tolls from the operation of the bridge or ferries could be used only for operating expenses and for the payment of the bonds and interest. When the bridge is constructed and all bonds are paid, the bridge shall become the property of the two states, and shall be operated free of tolls. The Treasury Department of the United States has recognized the Respondent Commission as a governmental agency and the interest income on all of its bonds is exempt from Federal Income Taxes (R. 9).

ARGUMENT.

I.

Sovereign Cannot Be Sued.

It is an established principle of jurisprudence in all civilized nations, resting upon grounds of public policy, that the sovereign cannot be sued in its own Courts or in any other Court without its consent.

Great Northern Life Ins. Co. v. *Read*, 322 U.S. 47, 88 L. Ed. 1121.

Walker v. *Felmont Oil Corp.*, 240 F. 2d 912 (6th Cir.).

49 Am. Jur., p. 301, Sec. 91.

81 C.J.S., p. 1300, Sec. 214.

(a) This has always been the law respecting the immunity of the United States.

United States v. *U. S. F. & G. Co.*, 309 U.S. 506, 84 L. Ed. 894.

(b) This has always been the rule in the State of Tennessee.

Automobile Sales Co. v. *Johnson*, 174 Tenn. 38, 122 SW2d 453, 120 A.L.R. 370.

(c) This rule likewise has always been recognized as the law of Missouri.

Nacy v. *LePage*, 341 Mo. 1039, 111 SW2d 25, 114 A.L.R. 259.

II.

Immunity Applies to Commissions, Agencies and Corporations Set Up by Sovereign to Perform Governmental Functions.

Following the general rule laid down *supra*, this immunity has been extended in tort actions to all commissions, sub-agencies, or corporations set up by the sovereign to perform governmental functions, such as the defendant Commission here.

(a) In Missouri the State Highway Commission was set up by the Legislature to build and maintain highways throughout the state, and is an agency similar to the defendant Commission. The State Highway Commission is immune from suit for torts.

Bush v. *State Highway Commission*, 329 Mo. 843, 46 SW2d 854.

Hill-Behan Lbr. Co. v. *Highway Commission*, 347 Mo. 671, 148 SW2d 499.

(b) The various counties in the State of Missouri are immune from tort action.

Swineford v. *Franklin County*, 73 Mo. 279.

Zoll v. *St. Louis County*, 343 Mo. 1061, 124 SW2d 1168.

(c) Cities are immune from tort action growing out of matters connected with their governmental powers.

Richardson v. *City of Hannibal*, 330 Mo. 398, 50 SW2d 648, 84 A.L.R. 508.

(d) Organized townships in the various counties in the State of Missouri are immune from tort action.

Cullor v. *Jackson Township*, 249 SW2d 393 (Mo. Sup.).

(e) The various school districts in the State of Missouri are immune from tort action.

Meadow Park Land Co. v. *School Dis.*, 301 Mo. 688, 257 SW 441.

Cochran v. *Wilson*, 287 Mo. 210, 229 SW 1050.

(f) The various colleges and universities in the State of Missouri, and which have boards and commissions to manage and control them, are immune from tort action.

Todd v. *University of Missouri*, 347 Mo. 460, 147 SW2d 1063.

(g) The various special road districts existing all over the State of Missouri are immune from tort action.

Sharp v. *Kurth*, 245 SW 636.

(h) Drainage and levee districts which are organized and controlled by local boards and supervisors are not liable in tort action.

State ex rel. v. *Allen*, 298 Mo. 448, 250 SW 905.

Kyle v. *St. Francis Levee District*, 153 SW2d 391.

Tant v. *Little River Drainage District*, 210 Mo. App. 420, 238 SW 848.

(i) This doctrine of immunity has been extended and applied to charitable institutions, even though the sovereign has nothing to do with them.

Dille v. *St. Luke's Hospital*, 196 SW2d 615, 355 Mo. 436.

Eads v. *Y. W. C. A.*, 325 Mo. 577, 29 SW2d 701.

(j) This rule of immunity from tort action enjoyed by political sub-divisions and political corporations is applied in Tennessee.

Rogers v. *Butler*, 170 Tenn. 125.

Taylor v. *Coble*, 28 Tenn. App. 167, 187 SW2d 648.

Williams v. *Morristown*, 32 Tenn. App. 274, 222 SW2d 607.

City of Kingsport v. *Lane*, 243 SW2d 289 (Tenn.).

III.

Consent Not Given to Be Sued.

Petitioner contends that Legislative Acts creating respondent Commission gave consent for the Commission to be sued. The provision referred to is as follows: "To contract, to sue and be sued in its own name; to purchase or otherwise acquire, hold and dispose of real and personal property." (Petitioner's Brief, Clause 3, page 23).

The Legislative Acts creating respondent Commission were passed and approved in the year 1949. At that time many prior Legislative Acts creating commissions, political sub-divisions, sub-agencies, etc., were on the statute books, giving such commissions, political sub-divisions, sub-agencies, etc., power to sue and be sued.

Section 245.290, R. S. Mo. 1949, provides that a levee district shall have the power to sue and be sued.

Section 233.025 and Section 233.170, R. S. Mo. 1949, provides that the two types of road districts shall have the power to sue and be sued.

Section 226.100, provides that State Highway Commission shall have the power to sue and be sued.

Section 165.263, R. S. Mo. 1949, provides that school districts shall have the power to sue and be sued.

Section 287.590, provides that the Workmen's Compensation Commission shall have the power to sue and be sued.

In *Todd* v. *University of Missouri*, 347 Mo. 460, 147 SW2d 1063, l.c. 1064, Judge Clark for the Supreme Court sufficiently answered this argument:

> "A statutory provision that such a public corporation 'may sue and be sued' does not authorize a suit

against it for negligence. '* * * But the waiver by the state for itself or its officers or agents of immunity from an action is one thing. Waiver of immunity from liability for the torts of the officers or agents of the state is quite another thing.'" Citing many cases.

If the Legislatures of Tennessee and Missouri intended to give consent for the institution of tort actions against the Bridge Commission they would have done so in appropriate terms (See: Fed. Tort Claim Act, 28 U.S.C.A. 1346 and 2674). The authorization for this Commission to sue and be sued is limited to those contractual obligations which it is authorized to enter into, and there was no intent to authorize it to be sued in tort.

We are dealing here with a contract between the states of Missouri and Tennessee and it is a uniform rule of law that when an Act of a Legislature is passed using a phrase or term already interpreted by the Courts, it is conclusively presumed that the legislative body had in mind the interpretations given by the courts, and applying that rule in this case it must be conclusively presumed that the States of Missouri and Tennessee did not intend to waive the immunity of the bridge commission by merely stating that it would have the power to sue and be sued. That phrase is only applicable to those acts and undertakings which were enjoined upon the commission by the laws creating the commission, and certainly there was no intent that such phrase would go to the extent of making the commission liable for torts of its employees.

There are no Federal decisions which overturn the interpretation given by our own courts, and upon the question of determining the intent of the two legislatures in using the phrase "may sue and be sued" the Federal Courts are bound by the interpretation given by the state courts. We do not controvert the fact that if this case ever gets to

the trial stage then the merits of the case will be governed by maritime law under the Jones Act, which embraces the Federal Employers Liability Act. The interpretation of the meaning of the acts of the two legislatures is not a federal question, but is governed by the interpretation given by the state courts whether or not they did or did not waive governmental immunity.

IV.

This Is Essentially a Suit Against States.

(a) The sole and only function of the defendant in this case is to operate ferries, build a bridge, issue revenue bonds, collect tolls to pay said bonds, and when the indebtedness is paid, turn the property over to the two states. The Commission is set up by the two states to perform a governmental function. The law of Tennessee and Missouri is clear that the building and maintaining of bridges and roads is a governmental function. This is likewise the Federal Rule, and the Federal Courts have uniformly held that agencies, whether they are of one state or of more than one state, such as the defendant here, are immune from tort action.

Kansas City Bridge Co. v. *Alabama State Bridge Corporation*, 59 F. 2d 48 (5th Cir.), cert. denied 287 U.S. 644.

Howell v. *Port of New York Authority*, 34 F. Supp. 797.

Armacost v. *Conservation Commission*, 126 F. Supp. 414.

Dupont v. *South Carolina Public Service Authority*, 100 F. Supp. 778.

(b) Whatever judgment that may hereafter be recovered in this case directly affects property of the states of Tennessee and Missouri because Respondent Commission is acting for and on behalf of the two states to acquire and pay for a bridge across the Mississippi River connecting

the highway systems of the two states which is to become the property of the two states. Therefore, respondent Commission is not an entity separate and apart from the two states.

In *Ford Motor Company* v. *Department of Treasury of Indiana*, 323 U.S. 459, 89 L. Ed. 389, l.c. 394, this Court stated: "We have previously held that the nature of a suit as one against the state is to be determined by the essential nature and effect of the proceeding", citing many authorities.

To the same effect are the following cases:

Great Northern Life Insurance Company v. *Read*, 322 U.S. 47, 88 L. Ed. 1121.

Oklahoma Real Estate Commission v. *National Business, etc.*, 229 F. 2d 205 (10th Cir.).

Annotation 62 A.L.R.2d 1222.

V.

Maritime Tort No Exception to Non-Liability.

(a) Petitioner contends that the operation of a ferry across the Mississippi River by respondent Commission makes respondent liable in tort under the Jones Act.

We have pointed out above that this is essentially a suit against the two states and that consent to be sued in tort has not been given. Therefore, without statutory authority there can be no liability for maritime torts committed by vessels owned by the sovereign, or its agents in the performance of statutory duties.

In *United States* v. *Thompson*, 257 U.S. 419, 66 L. Ed. 299, Mr. Justice Holmes for this Court in ruling upon this question stated:

> "It may be assumed that each of these vessels might have been libeled for maritime torts committed

after the redelivery that we have mentioned. But the Act of September 7, 1916, chap. 451, § 9, does not create a liability on the part of the United States, retrospectively, where one did not exist before. Neither, in our opinion, is such a liability created by the Act of March 9, 1920, chap. 95, § 4, authorizing the United States to assume the defense in suits like these. It is not required to abandon any defense that otherwise would be good. It appears to us plain that, before the passage of these acts, neither the United States nor the vessels in the hands of the United States, were liable to be sued for these alleged maritime torts."

(b) The Courts of the United States have uniformly held that without statutory authority the states, municipalities and commissions are immune from maritime tort actions.

In re The State of New York, 256 U.S. 490, 65 L. Ed. 1057.

In re The State of New York, 256 U.S. 503, 65 L. Ed. 1063.

Copper S. S. Co. v. *State of Michigan*, 194 F. 2d 465 (6th Cir.).

Banks v. *Liverman*, 226 F. 2d 524 (4th Cir.).

Schlmeyer v. *Romeo Co.*, 117 F. 2d 996 (9th Cir.).

On page 10 of Petitioner's Brief it is stated that the rule laid down in *Workman* v. *Mayor of New York*, 179 U.S. 552, should be applied. The Workman case was distinguished if not in fact overruled by the later decision in *The State of New York*, 256 U.S. 490, 65 L. Ed. 1057. We take the following quotation from the unanimous decision of this Court in the latter case, 65 L. Ed. l.c. 1063:

"There is no substance in the contention that this result enables the state of New York to impose its local law upon the admiralty jurisdiction, to the detriment of the characteristic symmetry and uniformity of the

rules of maritime law insisted upon in Workman v. New York, 179 U.S. 552, 557-560. * * * The symmetry and harmony maintained in those cases consists in the uniform operation and effect of the characteristic principles and rules of the maritime law (503) as a body of substantive law, operative alike upon all who are subject to the jurisdiction of the admiralty, and binding upon other courts as well. Chelentix v. Luckenbach S. S. Co., 247 U.S. 372, 382, 384, 62 L. Ed. 1171, 1175, 1176, 38 Sup. Ct. Rep. 501. It is not inconsistent in principle to accord to the states, which enjoy the prerogatives of sovereignty to the extent of being exempt from litigation at the suit of individuals in all other judicial tribunals, a like exemption in the courts of admiralty and maritime jurisdiction.

The want of authority in the District Court to entertain these proceedings in personam under Rule 59 (now 56), brought by the claimants against Mr. Walsh as superintendent of public works of the state of New York, is so clear, and the fact that the proceedings are in essence suits against the state without its consent is so evident, that instead of permitting them to run their slow course to final decree, with inevitable futile result, the writ of prohibition should be issued as prayed."

We also wish to call the attention of the Court to the case of *In re State of New York*, 256 U.S. 503, 65 L. Ed. 1063, wherein the opinion of the Court concluded as follows, 65 L. Ed. l.c. 1066:

"The principle so uniformly held to exempt the property of municipal corporations employed for public and governmental purposes from seizure by admiralty process in rem applies with even greater force to exempt public property of a state, used and employed for public and governmental purposes.

Upon the facts shown, the Queen City is exempt, and the prohibition should be issued."

See also the following cases:

State of Missouri v. *Fiske*, 290 U.S. 18, 78 L. Ed. 145.
Delaware River Joint Toll Bridge Commission v. *Colburn*, 310 U.S. 419, 84 L. Ed. 1287.
United States v. *McCarl*, 275 U.S. 1, 72 L. Ed. 131.
Johnson v. *United States Shipping Board*, 280 U.S. 320, 74 L. Ed. 451.

VI.

Eleventh Amendment Deprives Federal Court of Jurisdiction.

Amendment Number XI of the Constitution of the United States provides as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State."

It has uniformly been held that Federal Judicial power does not extend to any suit in law or equity against a state by citizens of another state even in cases arising under the Constitution or Laws of the United States. *Missouri* v. *Fiske*, 290 U.S. 18, 78 L. Ed. 145. This Amendment does not by its terms bar a citizen from suing his own state. However, this court has held that a state cannot be sued without its consent in a Federal Court by one of its own citizens. *Hans* v. *State of Louisiana*, 134 U.S. 1, 33 L. Ed. 842. The decision in the Hans case was recognized as properly stating the law in *Georgia Railroad and Banking Company* v. *Redwine*, 342 U.S. 299, 96 L. Ed. 335. See also *Great Northern Life Insurance Company* v. *Read*, 322 U.S. 47, 88 L. Ed. 1121; *Ford Motor Company* v. *Department of Treasury of the State of Indiana*, 323 U.S. 459, 89 L. Ed. 389;

Walker v. *Felmont Oil Corporation*, 240 F. 2d 912 (6th Cir.).

VII.

Petitioner in her brief, pages 14-17, relies heavily on *United States* v. *California*, 297 U.S. 175, 80 L. Ed. 567. That was a proceeding by the United States to collect a penalty for violation of the Safety Appliance Act. That decision cannot be controlling here because the Eleventh Amendment to the Constitution of the United States does not prohibit the United States from instituting suits in the Federal Courts. The action at bar is being prosecuted by an individual, and such an individual is precluded from instituting this suit against the respondent, which is an agency of the states performing a governmental function.

CONCLUSION.

For the reasons hereinabove given Respondent prays that the decision of the lower courts in this case be permitted to stand.

Respectfully submitted,

JAMES M. REEVES,
Caruthersville, Missouri,
WARD & REEVES,
Caruthersville, Missouri,
Attorneys for Respondent.